2009

Ginger Gardner v. SPX Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GINGER GARDNER, individually, and as guardian of her minor child, SABRINA LYNN GARDNER, HEATHER ANN GARDNER; and JOSHUA LEE GARDNER, Plaintiffs and Appellants, vs. SPX CORPORATION; HOJ ENGINEERING & SALES CO., INC., d/b/a DOCK & DOOR SERVICES, a Utah corporation; and SCHNEIDER CANADA, INC., a Canadian Corporation, Defendants and Appellees.	**BRIEF OF APPELLEE SCHNEIDER CANADA, INC.** Appeal No. 20090768 District Court No. 040922873

APPEAL FROM DECISIONS OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH THE HONORABLE JUDGES TIMOTHY R. HANSEN AND ROBERT P. FAUST

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LIST OF PARTIES

Schneider Electric Holdings, Inc. ("Schneider Electric") was a defendant for part of the proceedings before the trial court. The parties stipulated to the dismissal of all claims against Schneider Electric (R. 1288-93), and the trial court dismissed those claims accordingly. (R. 1294-1300.) The dismissal of the claims against Schneider Electric is not at issue in this appeal.

All other parties to this appeal and to the proceedings below are listed in the case caption.

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STATEMENT OF JURISDICTION

The Notice of Appeal filed by Appellants Ginger Gardner, Sabrina Lynn Gardner, Heather Ann Gardner, and Joshua Lee Gardner (collectively the "Gardners," "Plaintiffs," or "Appellants") was timely, and this Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2010).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court correctly grant appellee Schneider Canada Inc.'s ("Schneider Canada") Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Lack of Personal Jurisdiction?

STANDARD OF REVIEW: The Gardners correctly note that because the trial court made its determination concerning personal jurisdiction over Schneider Canada based upon affidavits submitted by the parties, this Court reviews the trial court's decision for correctness. *Phone Directories Co., Inc. v. Henderson*, 2000 UT 64, ¶ 2, 8 P.3d 256. However, because the Gardners did not controvert any of the jurisdictional facts set forth in the affidavits Schneider Canada submitted below, this Court takes those facts as true for purposes of this appeal, and disregards any contradictory facts that may be contained in the Gardners' Fourth Amended Complaint. *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1121 (Utah 1992).

2. Should this Court affirm the dismissal of the Gardners' claims against Schneider Canada on the alternative ground that those claims are moot because the jury's findings below in their special verdict exonerating SPX Corporation ("SPX") and HOJ

Engineering & Sales Co. Inc. ("HOJ"), together with the trial court's judgment on that verdict, collaterally estop the Gardners from proving their claims against Schneider Canada?

STANDARD OF REVIEW: The alternative ground for affirmance—mootness—was never before the trial court for consideration and has become apparent only after the Gardners framed the issues on appeal. Thus, this Court will necessarily be the first to undertake a mootness analysis. Nevertheless, ample authority exists for the proposition that an appellate court will not remand claims where further consideration by the trial court is futile because the claims are moot. *See, e.g., Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶¶ 130-137, 82 P.3d 1076 (affirming dismissal of fraud claim on alternative ground that jury verdict in trial below had destroyed an essential factual predicate for fraud claim, thus rendering claim moot and precluding reversal or remand); *see also Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 16, 48 P.3d 968 ("[W]e will not adjudicate issues when the underlying [claim] is moot. A [claim] is deemed moot when the requested judicial relief cannot affect the rights of the litigants.") (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 25, 16 P.3d 1233).

DETERMINATIVE PROVISONS ON APPEAL

The appeal of the district court's decision to dismiss the Fourth Amended Complaint against Schneider Canada for lack of personal jurisdiction turns on common law principles, the Utah Long-Arm Statute (Utah Code Ann. § 78B-3-201 et seq.), and the due process clause of the Fourteenth Amendment to the United States Constitution

Copies of the Long-Arm Statute and the Fourteenth Amendment to the U.S. Constitution are attached hereto as Addendum A and Addendum B, respectively.

The alternative ground upon which this Court can affirm the dismissal of the claims against Schneider Canada turns exclusively on common law collateral estoppel and mootness principles and does not rest on any particular constitutional provisions, statutes, ordinances, rules, or regulations.

STATEMENT OF THE CASE

Schneider Canada objects to the Gardners' Statement of the Case (Br. of Appellants at 2-9), because it contains characterizations of the evidence and the proceedings below that unfairly distort and entirely omit important portions of the trial record. Schneider Canada offers the following Statement of the Case, which more accurately describes the facts of the case, the record materials considered by the trial court, and the proceedings below.

A. Proceedings Below.

On May 26, 2006, the Gardners filed their Fourth Amended Complaint asserting claims for relief against Schneider Canada for negligence (claim 1), strict liability (claim 3), failure to warn (claim 4), breach of express and implied warranties (claim 6), and punitive damages (claim 7), as well as additional claims against the other defendants. (R. 889-900.) In this action, the Gardners allege that their decedent, Aaron Gardner, was fatally injured by a dock leveler at dock door number 51 of the Sysco West Jordan facility. (R. 891.) The Gardners allege the dock leveler was a Serco Dock Leveler that defendant SPX designed, manufactured, and sold, and defendant HOJ installed. (*Id.*)

The Gardners filed their Fourth Amended Complaint naming Schneider Canada as a defendant after SPX identified Schneider Canada as a party it alleged was at fault for the accident. (R. 892.) According to SPX, Schneider Canada was at fault because it allegedly sold to SPX a defective control panel, which SPX installed in the final product that was sold, distributed, and installed at dock door number 51 of the Sysco West Jordan facility. (R. 892.)

On July 31, 2006, Schneider Canada entered a special appearance and moved to dismiss the Gardners' Fourth Amended Complaint for lack of personal jurisdiction. (R. 956-986.) Schneider Canada brought its Motion to Dismiss on the grounds that it is a Canadian corporation with no place of business and no other significant presence in the state of Utah. (R. 957-58.) Schneider Canada argued it was not subject to personal jurisdiction in the trial court because, "[w]hile Schneider Canada designed and manufactured a component part of the subject dock door leveler—specifically, the control box placed in the subject dock door leveler—the marketing, design, manufacture, construction, distribution and sale of the component control box occurred *entirely in Canada*." (*Id.*; emphasis in original.) Schneider Canada supported its Motion to Dismiss with affidavits from Schneider Canada employee Jerold Blake Cross. (R. 959-962, 975-982.)

On August 24, 2006, the Gardners filed an opposition to Schneider Canada's Motion to Dismiss, in which they made essentially the same arguments they make on this appeal: (1) that Schneider Canada had sufficient contacts with Utah simply by placing the control box in the "national stream of commerce," and (2) that exercising personal

jurisdiction over Schneider Canada would not offend traditional notions of substantial justice and fair play because Schneider Canada, as an alleged "billion dollar corporation with global reach," should expect to be haled into court in Utah. (R. 987-99.) On August 31, 2006, SPX filed an opposition to Schneider Canada's Motion to Dismiss, in which it argued personal jurisdiction over Schneider was proper because, SPX alleged, Schneider Canada "transacts business in Utah." (R. 1000-1046.) On September 29, 2006, Schneider Canada filed reply memoranda addressing both the Gardners' and SPX's opposition memoranda. (R. 1049-1156.)

On January 25, 2007, the trial court heard argument on Schneider Canada's Motion to Dismiss.[1] (R. 1223.) The trial court granted the motion and directed counsel for Schneider Canada to prepare an order to that effect. (*Id.* at pp. 35-36) On April 11, 2007, the trial court signed and entered its Memorandum Opinion and Order Granting Schneider Canada, Inc.'s Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Lack of Personal Jurisdiction ("Memorandum Opinion"), which had been approved to form by counsel for the Gardners, SPX, and HOJ. (R. 1253-64; 2394-2405.) The Memorandum Opinion contained detailed Findings of Fact and Conclusions of Law

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[1] Schneider Electric Holdings, Inc. ("Schneider Electric"), which the Gardners added as a defendant in their Second Amended Complaint, also moved to dismiss for lack of personal jurisdiction. (R. 182-218.) On January 25, 2007, the district court heard argument and ruled on Schneider Canada's Motion to Dismiss only, not on Schneider Electric's Motion to Dismiss. (R. 2424.) The parties later stipulated to an order dismissing the Gardners' Fourth Amended Complaint against Schneider Electric on or about April 18, 2007. (R. 1288-1293.) The district court signed and entered the order on April 23, 2007. (R.1294-1300.) Having been dismissed from this action by stipulation, Schneider Electric is not a party to this appeal, nor do the Gardners pursue on appeal their jurisdictional arguments against Schneider Electric. (*See generally* Br. of Appellants.)

finding Schneider Canada was not subject to either general or specific jurisdiction in the state of Utah. A true and correct copy of the trial court's Memorandum Opinion is attached as Addendum C. Among other things, the trial court ruled as follows:

> 21. Schneider Canada is not conducting substantial and continuous local activity in the State of Utah sufficient to meet the requirements for this Court to confer general jurisdiction over Schneider Canada.
>
> 22. With regard to specific jurisdiction, while the facts in this case indicate that Schneider Canada's actions may fulfill one or some of the enumerated requirements set forth in Utah Code Ann. § 78-27-24 (West 2004) ("the Utah Long-Arm Statute"), the assertion of jurisdiction over Schneider Canada does not comport with the due process requirements of the Fourteenth Amendment. Schneider Canada does not have minimum contacts with Utah such that the maintenance of the suit against it does not offend traditional notions of fair play and substantial justice.
>
> 23. Schneider Canada's actions of manufacturing the control box in Canada in accordance to the specifications of the Canadian Division of Serco, and selling it to a Canadian distributor for ultimate placement in Serco's dock levelers is not activity sufficient to show that Schneider Canada purposefully availed itself of conducting business in the State of Utah.
>
> 24. Mere awareness on the part of Schneider Canada that some of the control boxes it manufactured would be placed in dock levelers to be sold and used in the United States market is not sufficient to confer jurisdiction over Schneider Canada in the State of Utah.
>
> 25. The actions of Schneider Canada of placing the control box into the stream of commerce are not sufficient to confer jurisdiction over Schneider Canada
>
> 26. Schneider Canada's relationship with Square D Company, does not establish jurisdiction over Schneider Canada.

27. In light of the above findings, Defendant Schneider Canada is not subject to the jurisdiction of the Court.

(R. 1258-59, 2399-2400.)

After the trial court's ruling dismissing their claims against Schneider Canada for lack of personal jurisdiction, the Gardners proceeded with their case against defendants SPX and HOJ. A jury trial was held on the Gardners' claims against SPX and HOJ from June 8, 2009 to June 16, 2009. (R. 2195-96, 2205, 2217-22, 2255-56, and 2273-74.) On June 16, 2009, the jury returned its verdict in which it found that: (1) SPX was not negligent in the design of its product; (2) the dock door leveler designed and sold by SPX did not contain a design defect that made the product unreasonably dangerous; and (3) HOJ was not negligent as alleged by Plaintiffs. (R. 2268-72.) A true and correct copy of the jury's special verdict is attached hereto as Addendum D. On August 27, 2009, the trial court entered judgment on the jury's verdict in favor of SPX and HOJ and against the Gardners. (R. 2376-2379.)

B. Statement of Facts.

1. Schneider Canada's Marketing, Design, Manufacture, Construction, Sale, and Distribution of the Control Box at Issue Occurred Entirely in Canada.

Schneider Canada is a Canadian corporation with its principal place of business in Toronto, Ontario, Canada. (R. 959, 976.) Schneider Canada markets, designs, manufactures, constructs, sells, and distributes a variety of products, parts, and components, and did, in fact, market, design, manufacture, construct, sell, and distribute

the control box that was a component part of the dock door leveler that is the subject of the underlying litigation. (R. 960, 976)

Schneider Canada designed the subject control box from specifications provided by Serco's[2] Canadian division. (*Id.*) All communications regarding the marketing, design, manufacture, construction, and sale of the control box at issue took place between and amongst individuals in Canada, including but not limited to representatives of Schneider Canada, representatives of Serco's Canadian division, and representatives of a London, Ontario, Canada distributor, Guillevin International, Inc. ("Guillevin"). (R. 960, 981.)

Schneider Canada sold the subject control box in Canada to Guillevin. (R. 960, 977.) Guillevin then sold the subject control box in Canada to Serco's Canadian division. (*Id.*) Serco's Canadian division, in turn, sold the control box to its affiliate, SPX, in the United States. (R. 960, 803.)

2. Schneider Canada Never Transacted Business in Utah or Purposefully Availed Itself of the Rights and Privileges of Conducting Business in Utah.

At the time of the marketing, design, and manufacture of the subject control box and its sale to the Canadian distributor Guillevin, Schneider Canada was not aware that the control box would be used in the state of Utah. (R. 961, 981.) Schneider Canada does not do business in the state of Utah, is not registered to conduct business in the state of Utah, and has not purposely availed itself of the rights and privileges of conducting

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[2] Serco is the predecessor-in-interest to SPX. (R. 957.)

business in Utah. (R. 961, 980.) Schneider Canada owns no property in the state of Utah, pays no taxes, has no employees, officers, or offices in the state of Utah, and has not had any continuous or systematic dealings with the state of Utah. (*Id.*) None of Schneider Canada's shareholders resides in the state of Utah. (*Id.*) Schneider Canada does not maintain telephone or facsimile listings within the state of Utah; nor does it advertise in the state of Utah. (*Id.*)

Furthermore, Schneider Canada has not conducted any business, communicated, or caused communications to occur with any consumer in the state of Utah; nor does a substantial percentage of its sales derive from revenue generated from customers in the state of Utah. (*Id.*) Schneider Canada does not render services to any customers in the state of Utah. (R. 961, 981.) Schneider Canada has not deliberately or purposefully designed, manufactured, constructed, distributed, or sold any product or part in the state of Utah; nor has Schneider Canada agreed to design, manufacture, construct, distribute, or sell any product in or from the state of Utah. (*Id.*)

3. Schneider Canada's Business Relationship Was With Serco's Canadian Division, Not SPX.[3]

Contrary to the Gardners' assertions, (Br. of Appellants at 6, ¶ 16), Schneider Canada, or its predecessor, has had a business relationship with Serco's Canadian division, not SPX, for over twenty years. (R. 1051, 1070.) Also contrary to the Gardners' assertions, (Br. of Appellants at 6, ¶¶ 17, 19), and as stated above, Schneider Canada sold hundreds of control panels to a Canadian distributor, Guillevin, not to SPX. (R. 1052, 1070.) Schneider Canada constructed and manufactured the control panels to Serco's Canadian division's specifications for incorporation into its vertical dock levelers. (*Id.*) Schneider Canada worked with employees from Serco's Canadian division, not SPX, (Br. of Appellants at 6, ¶ 18), using Serco's design specifications, parameters, and schematics to manufacture and produce a control panel for use in Serco's vertical dock leveler. Serco's control panel design would change on occasion, and Schneider Canada would coordinate with employees from Serco's Canadian division, not SPX, to modify the control panels to comply with any changes in the specifications, parameters and schematics of Serco's Canadian division. (R. 1052, 1070-71.)

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[3] The next several sections contain facts that directly contradict the Gardners' Statement of Facts concerning "Schneider Canada's Contacts and the Schneider Companies." (*See* Br. of Appellants at 6-8.) To the extent there were disputes between Schneider Canada's and the Gardners' facts, the trial court properly resolved those disputes in favor of Schneider Canada, (*see* R. 1256-58, 2397-99), and Schneider Canada's facts presented herein are entitled to deference on appeal. *See Arguello v. Ind. Woodworking Machine Co.*, 838 P.2d 1120, 1121 (Utah 1992) (finding that facts asserted in defendant's affidavit are taken as true and the facts in plaintiff's complaint are considered "only to the extent that they do not contradict the affidavit").

4. After Selling the Control Boxes to Guillevin, Schneider Canada Had No Control Over Where the Control Boxes Were Shipped or Installed.

Contrary to the Gardners' assertions, (Br. of Appellants at 6, ¶ 20), Schneider Canada did not have control over where, when, and to whom the subject control panel was sold. (R. 1054, 1070.) To the best of Schneider Canada's knowledge and belief, the subject control panel and all others like it manufactured by Schneider Canada were sold by a Canadian distributor, Guillevin, to Serco's Canadian division. (*Id.*) Schneider Canada admittedly understood that some of the control panels were or would be installed by Serco in vertical dock levelers that would be used in the United States; however, Schneider Canada did not have knowledge of the particular states in which those vertical dock levelers would be or were installed. (R. 1054, 1071.) Specifically, Schneider Canada did not have knowledge of any vertical dock leveler installed in the state of Utah. (*Id.*)

Responding to the Gardners' assertion that Schneider Canada made a sales presentation to SPX in Dallas, Texas, (Br. of Appellants at 6, ¶ 20), the referenced presentation was for a different product than the control panel for the vertical dock leveler and was completely unrelated to the control panel for the vertical dock leveler. (R. 1054-55, 1071.) Also contrary to the Gardners' assertions, (Br. of Appellants at 6-7, ¶ 21), Schneider Canada does not have specific knowledge, nor did it have specific knowledge at the time of the sale of the subject control panel, of what proportion of the vertical dock levelers manufactured by Serco were installed in the United States. (R. 1054, 1071.)

5. Schneider Canada, Schneider Electric Holdings, Inc., and Square D Company Are Separate and Distinct Legal Entities.

The Gardners spend paragraphs 22 through 31 of their Statement of Facts attempting to blur the legal distinctions between Schneider Canada, Schneider Electric, and Square D Company[4] in an attempt to establish that personal jurisdiction over one of Schneider Canada's affiliated entities justified the exercise of personal jurisdiction over Schneider Canada.[5] (Br. of Appellants at 7-8, ¶¶ 22-31.) The record below, which is entitled to deference on this appeal, establishes that the entities are separate and distinct, and the relationship between the entities is therefore not relevant to the jurisdictional question before this Court.

Schneider Electric Holdings, Inc. ("Schneider Electric") is a Delaware corporation that operates as a holding company and has an ownership interest in Square D Company ("Square D"). (R. 537, 558.) Schneider Electric does not have any ownership interest in Schneider Canada. (*Id.*) Schneider Electric is a legal entity separate and distinct from Square D and Schneider Canada, and is not involved in the day-to-day operations of

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[4] Square D underwent a corporate name change in December 2009, but it was still known as Square D at all relevant times. Accordingly, we refer to it as Square D throughout this brief.

[5] The Gardners characterize the three companies as a "global conglomerate" and refer to them as the "Schneider Companies," even though neither term is actually used by Schneider Canada, Square D, or Schneider Electric. (Br. of Appellants at 7, ¶ 22.) The Gardners improperly conflate the three entities, converting their jurisdictional argument into an argument for piercing the corporate veil. However, they present no evidence to support their stealth argument to pierce the corporate veil, and their attempt to cast the three entities as one is therefore improper. Indeed, the record evidence presented herein (and to the trial court below) shows that the three entities are separate and distinct and that they should be treated as such under the law.

either company. (R. 538-558.) Schneider Electric has its own officers and Board of Directors; it keeps its own books and accounting records; and it has its own bank accounts, separate and distinct from Square D and Schneider Canada. (*Id.*)

Square D is a Delaware corporation that markets, designs, manufactures, constructs, sells, and distributes a variety of products, parts, and components. (R. 539, 563-64.) While Square D has an ownership interest in Schneider Canada, it is a legal entity separate and distinct from Schneider Electric and Schneider Canada. (R. 539, 563.). It has its own officers and Board of Directors; it keeps its own books accounting records; and it has its own bank accounts separate and distinct from Schneider Electric and Schneider Canada. (*Id.*) It is entirely responsible for meeting its own payroll, providing benefits to its own employees, and paying its other business expenses. (*Id.*)

As stated above, Schneider Canada is a Canadian corporation that markets, designs, manufactures, constructs, sells, and distributes a variety of products, parts, and components. (R. 959, 976.) Schneider Canada is a legal entity separate and distinct from Schneider Electric and Square D and it has own Board of Directors, officers, managers, and employees who are responsible for Schneider Canada's day-to-day business operations. (R. 540, 564.)

The fact that Schneider Canada uses the same brands as Square D or Schneider Electric, (Br. of Appellants at 7, ¶¶ 22, 25, 26), that Schneider Canada's website can be accessed through Schneider Electric's website, (*see id.* at 7, ¶ 27), or that Schneider Electric's website turns up the names of distributors and a sales agent in Utah, (*see id.* at 8, ¶ 29), is not determinative of the trial court's exercise of personal jurisdiction over

Schneider Canada. Likewise, the fact that Square D has offices in Utah, is registered as a corporation in Utah, and has a registered agent in Utah, (Br. of Appellants at 8, ¶ 30), is not determinative of the trial court's exercise of personal jurisdiction over Schneider Canada, a subsidiary of Square D. Finally, the fact that one of Square D's other subsidiaries, EFI Electronics, was advertising for jobs in Utah, (Br. of Appellants at 8, ¶ 31), has no bearing on the jurisdictional question as it relates to Schneider Canada.

SUMMARY OF ARGUMENT

The trial court correctly granted Schneider Canada's Motion to Dismiss for lack of personal jurisdiction because Schneider Canada is a Canadian corporation with no place of business, or any other significant presence, in the state of Utah. Moreover, Schneider Canada's marketing, design, manufacture, construction, distribution, and sale of the control panel that was a component part of the SPX dock door leveler that allegedly caused Aaron Gardner's injury occurred entirely in Canada. Thus, the Gardners cannot show that Schneider Canada has minimum contacts with Utah such that maintenance of the Gardners' lawsuit against Schneider Canada in Utah does not offend traditional notions of fair play and substantial justice

The Gardners' argument that Schneider Canada is subject to the specific personal jurisdiction of a Utah court under a "stream of commerce" theory fails under the controlling law and the record evidence. To establish personal jurisdiction under the "stream of commerce" theory, the Gardners must show that Schneider Canada took deliberate steps specifically to serve the state of Utah with the control panel that was a component part of the dock door leveler that is the subject of the underlying lawsuit.

Furthermore, Schneider Canada's mere awareness that its product may ultimately be used in dock door levelers installed in the United States is not sufficient to confer jurisdiction in the Utah courts under this theory. The Gardners cannot prevail under this theory because the record evidence establishes that Schneider Canada did not take any steps whatsoever to serve the Utah market such that it could reasonably foresee being haled into a Utah court.

The Gardners' argument that Schneider Canada is subject to the specific personal jurisdiction of a Utah court under a "corporate conglomerate" theory also fails as a matter of law. In essence, the Gardners argue that Schneider Canada is subject to the jurisdiction of Utah courts by virtue of its affiliation with Square D (Schneider Canada's parent company) and Schneider Electric (Square D's parent company). However, in order to establish an alter-ego relationship for jurisdictional purposes, the Gardners must show there exists a unity of interest between Schneider Canada, Square D, and Schneider Electric that is so substantial as to warrant the disregard of those entities' corporate identities. According to the cases cited in their own brief, the Gardners must show that the parent exercises significant control over the subsidiary corporation's day-to-day operations and internal affairs, or that the parent is using the subsidiary corporation to perpetrate a fraud. The Gardners have made no effort whatsoever to satisfy this veil-piercing standard, and disregard of Schneider Canada's corporate identity for jurisdictional purposes is therefore improper.

Finally, even if this Court were to disagree with the trial court's personal jurisdiction ruling, the Court should still affirm the dismissal of the claims against

Schneider Canada because the jury's disposition of the claims against the other defendants below renders the claims against Schneider Canada moot. Thus, remanding this matter to the trial court for litigation against Schneider Canada would be futile. This Court should affirm the jury verdict, and the judgment below that is based on the verdict, for reasons co-appellees SPX and HOJ will explain in their briefs. The jury found that SPX's dock door leveler did ***not*** contain a design defect that made the product unreasonably dangerous. Because Schneider Canada's control panel was simply a component part of SPX's dock door leveler, the Gardners are collaterally estopped by the jury verdict from pursuing their defective design claims against Schneider Canada. Thus their claims against Schneider Canada are moot, and reversing and remanding based on the trial court's personal jurisdiction ruling would be futile. If necessary, this Court can and should affirm the trial court's dismissal of the claims against Schneider Canada on this alternative ground.

ARGUMENT

I. STANDARD OF REVIEW.

Because the trial court made its decision concerning personal jurisdiction over Schneider Canada based upon affidavits, an appeal from that decision presents only legal questions that are reviewed for correctness. *Phone Directories Co., Inc. v. Henderson*, 2000 UT 64, ¶ 2, 8 P.3d 256 (citing *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1121 (Utah 1992)). However, because the Gardners did not controvert Schneider Canada's version of the jurisdictional facts in the trial court below, "for purposes of this appeal, the facts asserted in [Schneider Canada's] affidavit[s] are taken

as true and the facts recited in the complaint are considered only to the extent that they do not contradict the affidavit[s]." *Arguello*, 838 P.2d at 1121.

II. THE TRIAL COURT CORRECTLY RULED THAT IT DID NOT HAVE JURISDICTION OVER SCHNEIDER CANADA.

The Court should affirm the trial court's ruling granting Schneider Canada's motion to dismiss for lack of personal jurisdiction. Personal jurisdiction is generally divided into two categories: general jurisdiction and specific jurisdiction. *Arguello*, 838 P.2d at 1122. The Gardners do not argue on this appeal that the trial court should have exercised general jurisdiction over Schneider Canada. Instead, they argue it should have exercised specific jurisdiction over Schneider Canada.

In order to establish specific personal jurisdiction over Schneider Canada, the Gardners must show that "(1) the Utah long-arm statute extends to [Schneider Canada's] acts or contacts, (2) [the Gardners'] claim arises out of those acts or contacts, and (3) the exercise of jurisdiction satisfies [Schneider Canada's] right to due process under the United States Constitution." *Pohl, Inc. of America v. Webelhuth*, 2007 UT App 225, ¶ 6, 164 P.3d 1272 (quoting *Fenn v. Mleads Enters., Inc.*, 2006 UT 8, ¶ 8, 137 P.3d 706). As the trial court correctly found, the Gardners cannot show that the exercise of specific personal jurisdiction over Schneider Canada is warranted.

A. The Gardners Cannot Show that Schneider Canada's Acts or Contacts Fall Within the Utah Long-Arm Statute.

The Gardners fail to present evidence from the record below to establish that Schneider Canada falls within the reach of the Utah long-arm statute. The Utah long-arm statute provides, in pertinent part:

> Any person . . . whether or not a citizen or resident of this state, who, in person or through an agent, does any of the following of the enumerated acts is subject to the jurisdiction of the courts of this state as to any claim arising out of or related to:
>
> (1) The transaction of any business within this state; [or]
>
> . . .
>
> (3) The causing of any injury within this state whether tortuous or by breach of warranty.

Utah Code Ann. § 78B-3-205.[6] The Gardners first argue that Schneider Canada's conduct falls within Utah's long-arm statute because the control panel manufactured by Schneider Canada "failed and was a cause of Mr. Gardner's death." (Br. of Appellants at p. 13.) The Gardners cite to the testimony of Sergeant Nunnelley and their expert, Fred Smith, to support this assertion. (*Id.* at 3-5.) The jury's factual findings, however, directly contradict the Gardners' assertion. The jury answered "No" to question number three on the special verdict form: "Did Defendant SPX Corporation manufacture and sell a ***product that contained a design defect*** that made the product unreasonably dangerous?" (R. 2269 (emphasis added).) Schneider Canada's control box was only a component part of the end product, SPX's dock door leveler. The jury's finding that the dock door leveler did not contain a design defect necessarily encompasses all of its component parts, including Schneider Canada's control box. Thus, it would be incorrect to hold that Schneider Canada is subject to Utah's long-arm statute because its control box did not cause the subject injury.

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[6] At the time the trial court made its decision on Schneider Canada's Motion to dismiss in 2007, the Utah long-arm statute was numbered Utah Code Ann. § 78-27-24.

The Gardners next contend Schneider Canada's conduct falls within the Utah long-arm statute because Schneider Canada "transacted business" in Utah. (Br. of Appellants at p. 13.) Because the Gardners cannot show Schneider Canada itself actually transacted any business in Utah, they must base their argument on the fact that Schneider Canada is "a subsidiary of Square D, and part of the global Schneider Electric conglomerate." (*Id.*) The law is clear, however, that "jurisdiction over a parent corporation [Square D] does not automatically establish jurisdiction over a subsidiary corporation [Schneider Canada]." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). Thus, as detailed further below in Section II(B)(2), the fact that Schneider Canada is a subsidiary of Square D, which is a subsidiary of Schneider Electric, does not, in an of itself, establish personal jurisdiction over Schneider Canada.

Because the Gardners cannot establish Schneider Canada engaged in any of the acts enumerated by the Utah long-arm statute, the Court's inquiry into the jurisdictional question is ended. As explained in the following section, however, even if the Gardners were able to satisfy the Utah long-arm statute, they cannot show that the exercise of personal jurisdiction over Schneider Canada comports with Schneider Canada's right to due process under the Constitution.

B. Exercising Personal Jurisdiction over Schneider Canada Does Not Comport with Due Process.

Although Schneider Canada's activities are outside the reach of the Utah long-arm statute, federal due process also precludes the exercise of personal jurisdiction over Schneider Canada. "Due process requires that before a court can exercise specific

personal jurisdiction over a non-resident defendant, the defendant must have had 'minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 662 (Utah 1989) (citing *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1110 (Utah 1985); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "Further, the defendants' 'conduct and connection with the forum state [must be] such that [they] should reasonably anticipate being haled into court there.'" *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The court must examine whether the defendant corporation has "purposefully availed" itself of the privilege of conducting activities within the forum state. *Id.*

In this case, Schneider Canada does not have the required minimum contacts with the state of Utah sufficient to confer jurisdiction. Indeed, Schneider Canada's contacts with Utah are virtually non-existent and certainly would not allow Schneider Canada reasonably to anticipate being haled into court in Utah. As set forth above, Schneider Canada is located and operates in Canada. It maintains no offices, owns no property, and has no employees in the State of Utah. Moreover, the subject control box in this case—which is only a *component part* of the dock door leveler Serco manufactured—was designed, manufactured, and constructed in Canada by Schneider Canada. The control box was then sold in Canada to a Canadian distributor, Guillevin. Neither the general activities of Schneider Canada (which operates not only outside Utah, but outside the United States), nor its specific activities with regard to the subject control box component part (which was designed, manufactured and sold not only outside of Utah but outside of

the United States) can be considered contacts sufficient enough to hold Schneider Canada purposefully availed itself of the laws of Utah. To confer jurisdiction on Schneider Canada anywhere in the United States, let alone in Utah, would certainly violate the notions of fair play and substantial justice.

To support their claim that the exercise of personal jurisdiction over Schneider Canada comports with the due process requirements of the Constitution, the Gardners advance the same arguments the trial court already rejected below. First, the Gardners claim the exercise of personal jurisdiction over Schneider Canada is proper under a "stream of commerce theory." (Br. of Appellants at 14-20.) Second, the Gardners claim the exercise of personal jurisdiction over Schneider Canada is proper because Schneider Canada is part of a global conglomerate of entities, some of which transact business in Utah. (Br. of Appellants at 20-23.) As detailed in the following sections, neither of the Gardners' arguments warrants the exercise of personal jurisdiction over Schneider Canada under the Due Process Clause.

1. Schneider Canada is not Subject to Personal Jurisdiction Merely Because It Placed the Control Box Component in the Stream of Commerce in Canada.

The Gardners argue that because Schneider Canada put the control box component part into the stream of commerce, it has submitted itself to the jurisdiction of the Utah courts. This is simply not the case. The "stream of commerce" theory is based on the premise that "[o]ne who puts a product into the stream of commerce in such a fashion as to reasonably foresee its sale in a certain jurisdiction cannot complain of having to defend against claims in that jurisdiction arising out of the product's presence there." *Arguello*,

838 P.2d at 1124. Merely putting the product into the stream of commerce is not sufficient; "the defendant must have taken ***deliberate steps to serve the forum state market*** with the product that is the subject of the suit before being susceptible to jurisdiction in that state." *Id.* (emphasis added).

In other words, as articulated by Justice O'Connor in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987):

> The placement of a product in to the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum state, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State. ***But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product in to the stream into an act purposefully directed toward the forum State.***

Id. at 112 (emphasis added).

In *Asahi*, the foreign Japanese defendant manufactured a component part (in that case, a tire valve) which was then placed into a completed Taiwanese product in Taiwan and shipped by the Taiwanese company to California. The Supreme Court found that the plaintiff had not demonstrated any action by the Japanese tire valve manufacturer to purposefully avail itself of the California market, and the exercise of jurisdiction by the Superior Court of California was therefore improper. *Id.*

Here, as in *Asahi*, Schneider Canada designed and manufactured a component part of the Serco dock door leveler—the control box. That component part was designed, manufactured, and sold only in Canada to a Canadian distributor. Indeed, all communications regarding the design, manufacture, and sale of the control box took place entirely in Canada. The control box component part was then sold to Serco in Canada, and Serco then brought it into the United States.

While it is certainly clear that Serco/SPX took deliberate steps to serve the market in Utah, the same cannot be said for Schneider Canada, whose activities all occurred in Canada. Schneider Canada itself made no effort and took no steps to put the control box component part into the stream of commerce in the United States—those steps were all taken by Serco's Canadian division after Schneider Canada had sold the part to the Canadian distributor. Schneider Canada, like the defendants in *Asahi*, only manufactured a component part of a finished complete product that was then distributed by some other, unrelated, entity. Schneider Canada cannot be held to have reasonably anticipated being haled in to Court in Utah because it sold no control boxes in Utah and did not seek to serve the Utah market. *See Arguello*, 838 P.2d at 1125. Accordingly, jurisdiction cannot be conferred over Schneider Canada based on a stream of commerce theory.

The Gardners go to great lengths to distinguish this case from *Parry* and *Arguello*, both of which were cases in which the Utah Supreme Court found lack of personal jurisdiction under the stream of commerce theory. (Br. of Appellants at 18-20.) In order to make their distinctions of the two cases work, however, the Gardners must rely on

incorrect facts from the record below, and they must ignore key factors upon which the *Parry* and *Arguello* Courts ruled.

As to the Gardners' incorrect assertions of fact, the Gardners claim Schneider Canada dealt directly with SPX. (Br. of Appellants at 18.)[7] The record below, however, establishes Schneider Canada sold the control panels to a Canadian distributor, Guillevin, which eventually sold them to Serco's *Canadian* division. Serco's Canadian division then distributed them to its United States affiliate, SPX. The Gardners' version of the facts incorrectly ignores the channels through which Schneider Canada's control panel actually passed. The Court should reject the Gardners' attempt to bolster their stream of commerce theory by distorting the record below.

The Gardners must also ignore important similarities between this case and the cases of *Parry* and *Arguello* to make their "stream of commerce theory" fit. The Gardners claim the Japanese defendants in *Parry* "claimed they had no knowledge of where their mauls would be sold." (Br. of Appellants at 19.) To the contrary, it is clear from the *Parry* opinion itself that the Japanese defendants were informed of sales in the Western United States, but "they neither came to Utah nor sent sales representatives to Utah to facilitate the marketing and purchase of their product." *Parry*, 779 P.2d at 666.

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[7] The Gardners also argue Schneider Canada representatives visited Serco in the United States (Texas, not Utah), and Schneider Canada does not dispute that. Such visit, however, was unrelated to the control panels for the vertical dock levelers. Accordingly, and as the Gardners fail to note, Aaron Gardner's injuries could not have arisen out of or been related to the Texas contact. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Moreover, this visit to Texas for an unrelated product does not lead to the Gardners' unsupported legal conclusion that Schneider Canada could reasonably expect to be sued in Utah.

The *Parry* Court also found important that the Japanese defendants did not "show special designing for Utah's market, advertis[e] in Utah, establish[] channels for providing regular advice to customers in Utah, or market[] the product through a distributor who has agreed to act as a sales agent in Utah." *Id.* Here, even if it can be alleged that Schneider Canada expected that some of its control panels could be used in dock door levelers installed in the United States, Schneider Canada, like the Japanese defendants in *Parry*, did not take any active steps to sell or market its product in Utah, and the Gardners' stream of commerce theory fails.

Key similarities between this case and *Arguello* also preclude specific personal jurisdiction over Schneider Canada. The *Arguello* Court found it important that the out-of-state defendant "did not seek to serve the Utah market . . . through either sales representatives or advertising." *Arguello*, 838 P.2d at 1125. Moreover, the machine in *Arguello* was sold in California, making it unforeseeable that the machine would be resold in Utah. *Id.* In this case, Schneider Canada likewise did not actively seek to serve the Utah market. It did not sell its product directly into the Utah market. Rather, Schneider Canada sold its control panels to a Canadian distributor in Canada, who then sold the control panels to another Canadian company, who ultimately sold the control panels to SPX. Schneider Canada had no control over and could not reasonably foresee where its control panels would end up once it sold them to Guillevin, the Canadian distributor.

In sum, there is no meanginful distinction between the case at hand and *Parry* and *Arguello*. As in *Parry* and *Arguello*, the exercise of personal jurisdiction over Schneider

Canada under a "stream of commerce" theory in this case is improper. Schneider Canada's mere awareness that its control panels could be used on dock door levelers in the United States is insufficient to warrant the exercise of personal jurisdiction. Because Schneider Canada did not take any deliberate steps at any time to serve the Utah market, the Gardners' stream of commerce theory of jurisdiction fails as a matter of law, as the trial court correctly held.

2. Schneider Canada is not Subject to Personal Jurisdiction Under the Garders' Corporate Conglomerate Theory.

The Gardners also argue specific personal jurisdiction over Schneider Canada is proper because Schneider Canada's parent, Square D, allegedly has "minimum contacts" in Utah, and because Schneider Canada is "part of a multi-national conglomerate." (Br. of Appellants at 20-23.) In essence, the Gardners are attempting to bootstrap Schneider Canada into this action by way of its affiliation with related corporate entities, including, but not limited to, Schneider Canada's parent company, Square D, and Square D's parent company, Schneider Electric. The Gardners' corporate conglomerate theory of jurisdiction has no support in the law.

The Supreme Court has stated that jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary. *See Keeton*, 465 U.S. at 770. Jurisdiction over two related defendants is generally only proper if the requirements of *Int'l Shoe* are met for ***both***. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (concluding that each corporation's contacts with the forum state must be assessed individually).

Schneider Canada, itself, does not have minimum contacts with the state of Utah, and imputing the contacts of its parent company, Square D, to Schneider Canada is unwarranted. As set forth above, Schneider Canada is a subsidiary of Square D. Square D is a subsidiary of Schneider Electric. Square D is not a defendant in this action and did not market, manufacture, construct, sell, or distribute the control box at issue. Accordingly, jurisdiction over Schneider Canada can only be judged on *its own contacts* with the state of Utah and must be determined based on an analysis of whether the due process requirements are met for *Schneider Canada*, not for Square D or Schneider Electric.

The Gardners blur the distinction between Schneider Canada and related corporate entities in support of their corporate conglomerate theory of jurisdiction. They do so by commingling Schneider Canada with these related corporate entities (*e.g.*, Square D) and various trade names (*e.g.*, Telemecanique) and then labeling Schneider Canada as "part of a multi-national conglomerate." (Br. of Appellant at 22-23.) The Gardners claim that a Schneider Electric website that links to Square D's and Schneider Canada's websites is proof that the entities are essentially one in the same and should be treated as such for jurisdictional purposes. (Br. of Appellants at 22.)

The Gardners, however, ignore the very case law upon which they rely to support the corporate conglomerate theory. That case law, which the Gardners cite on pages 20 and 21 of their brief, requires them to demonstrate a basis for piercing the corporate veil before this Court may disgregard the separate and distinct identities of Schneider Canada, Square D, and Schneider Electric. To illustrate what a difficult burden the Gardners bear

in piercing the corporate veil and disregarding the corporate form for jurisdictional purposes, it is important to note that in only two of the seven cases the Gardners cite did the court actually find there was enough evidence to pierce the corporate veil of a related entity. In one such case, *In re Cyclobenzaprine*, 693 F. Supp. 2d 409 (D. Del. 2010), the court pierced the corporate veil based on evidence that the entities shared the same business address and some of the same employees. *Id.* at 420. The same cannot be said of Schneider Canada, Square D, and Schneider Electric. In another case, *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640 (5th Cir. 2002), the court pierced the corporate veil of a successor corporation that was a "mere continuation of its predecessor corporation." *Id.* at 654. Again, there are no facts here that Schneider Canada is a mere continuation of either Square D or Schneider Electric. In the other five cases cited by the Gardners, the courts found insufficient evidence to justify disregard of the corporate form.[8]

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[8] Indeed, in those cases, the courts required much more of a connection to substantiate an alter ego relationship than what the Gardners allege here (*i.e.* links on websites, marketing similar brands, etc.). *See In re Chocolate Confectionary Antitrust Litigation*, 674 F. Supp. 2d 580, 598-602 (M.D. Pa. 2009) (finding that Mars Global and Mars Canada maintained distinct corporate entities and there was therefore no evidence of an alter ego relationship between the companies; also stating that "the level of control necessary to substantiate an alter ego relationship must exceed the usual supervision that a parent exercises over a subsidiary"); *Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Tech. Fin. Group*, 299 F. Supp. 2d 505, 514-15 (D. Md. 2004) (refusing to pierce the corporate veil for jurisdictional purposes because plaintiff could not show defendant used the corporate entities to perpetuate a fraud); *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 653-54 (Tenn. 2009) (declining to disregard the corporate identity of parent and subsidiary for jurisdictional purposes where plaintiff failed to allege that parent exercised complete control of subsidiary's internal affairs or daily operations); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 798-99 (Tex. 2002) (plaintiff

The Gardners do not even bother to set forth the standard for piercing the corporate veil in Utah, let alone present facts to satisfy the standard. In order to pierce the corporate veil in Utah, a plaintiff must meet the following two part test:

> (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979) (emphasis added). It is not enough that the subsidiary corporation did not have a separate personality; a plaintiff must also show that the parent caused the subsidiary to be used to perpetrate a fraud. *Baldwin v. Matthew R. White Inv., Inc.*, 669 F. Supp. 1054, 1055-56 (D. Utah 1987).[9]

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failed to show parent controlled the internal business operations and affairs of the subsidiary, which is the showing required to "'fuse' the parent company and its subsidiary for jurisdictional purposes"); *Hobbs v. Don Mealey Chevrolet, Inc.*, 642 So.2d 1149, 1156-57 (Fla. Dist. Ct. App. 1994) (stating that the corporate veil cannot be pierced for jurisdictional purposes absent a showing of improper conduct, which plaintiff had failed to make).

The Gardners do not seek to satisfy any of the veil-piercing tests enumerated in the cases they cite. For example, they do not claim Square D controlled Schneider Canada's internal business operations or affairs, or used Schneider Canada to perpetrate a fraud. In short, the Gardners have failed to allege any facts that would justify the application of the extreme remedy of veil-piercing.

[9] Utah courts view piercing the corporate veil under an alter ego theory as a severe action that courts should undertake only rarely, in the most extreme circumstances. *Compare Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990) ("[C]orporate veils exist for a reason and should be pierced only reluctantly and cautiously.").

Utah courts look primarily to the following factors to determine whether to disregard the corporate veil for jurisdictional purposes:

> (1) whether distinct and adequately capitalized financial units are incorporated and maintained;
>
> (2) whether daily operations of the two corporations are separate;
>
> (3) whether formal barriers between management of the two entities are erected, with each functioning in its own best interests;
>
> (4) whether those with whom the corporations come in contact are apprised of their separate identity;
>
> (5) whether the corporation was used as a façade for operations of the dominant shareholder; and
>
> (6) the use of the corporate entity in promoting injustice or fraud.

Id. (citations omitted); *Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987).

An examination of the Gardners' alleged evidence shows none of those factors is present here. The exclusive basis of the Gardners' alter ego claims is the following: (1) "Schneider Electric owns an Internet website which has a link to Schneider Canada, Schneider Holdings, Square D, as well as other affiliates and markets"; (2) "[t]he Schneider Companies maintain an English-language website marketing the Telemecanique brand of product that was used . . . in the Control Panel"; (3) "[t]he Schneider Companies maintain scores of virtually identically websites geared towards marketing and selling their products"; (4) Schneider Electric's website produces "a list of 16 distributors in Utah, one sales agent in Utah, and an electronic catalog of Telemecanique products"; (5) "Square D maintains an office in Utah, is registered as a

corporation in Utah, and has a registered agent in Utah"; and (6) "Schneider Electric was advertising for jobs in Utah . . . with EFI Electronics, which was another one of Square D's subsidiaries," prior to the district court's ruling granting Schneider Canada's Motion to Dismiss. (Br. of Appellants at 22.)

Noticeably absent from the Gardners' brief are any allegations that either Schneider Electric or Square D treats Schneider Canada as its alter ego. For example, the Gardners do not allege that either Schneider Electric or Square D commingles funds with Schneider Canada, that either Schneider Electric or Square D controls the day-to-day operations of Schneider Canada, or that either Schneider Electric or Square D uses Schneider Canada as a façade or to perpetrate a fraud. To the contrary, the record evidence shows Schneider Canada has its own Board of Directors, officers, managers, and employees, who are responsible for the day-to-day business operations of Schneider Canada. It establishes Schneider Canada is a wholly separate and autonomous business entity from that of Square D and Schneider Electric. Accordingly, there is no basis to pierce the corporate veil and disregard the corporate form for jurisdictional purposes.

3. Balancing the Convenience of the Parties and the Interests of the State of Utah Dictates That the Court Should Not Assume Jurisdiction Over Schneider Canada.

As set forth in *Parry*, when considering the exercise of jurisdiction over a foreign corporation, the courts "must also examine '[w]hether the cause of action arises out of or has a substantial connection with the activity [in the forum state] and [whether there was a] balancing of the convenience of the parties and the interests of the State in assuming jurisdiction.'" *Parry*, 779 P.2d at 662 (citing *Synergetics*, 701 P.2d at 1110). In making

this examination, there are "important differences between assertions of jurisdiction in the interstate context and those in the international context." *Id.* As *Parry* discusses, courts have recognized "the inconvenience placed upon international defendants when balanced against the forum state's interest in litigating the plaintiff's claims: '***The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.***'" *Id.* (quoting *Asahi*, 480 U.S. at 114 (emphasis added)).

There is no doubt Schneider Canada, as a Canadian corporation, "faces substantial inconvenience in litigating in a foreign forum." *Parry*, 779 P.2d at 668. Moreover, while Schneider Canada recognizes the "interests of the state to 'provide its citizens with an effective means of redress,'" in this case, this Court can successfully balance what appears to be conflicting interests. *Id.* Here—as opposed to other cases where the plaintiff's only redress lies against a foreign defendant—the Gardners tried their case against the defendant that manufactured the dock door leveler actually implicated in Mr. Gardner's death as well as the defendant that installed such dock door leveler.

The fact that the Gardners had their redress against the other defendants in Utah Court balanced against the formidable inconvenience of Schneider Canada having to defend a lawsuit in a state where it does not have sufficient minimum contacts must lead to the conclusion that Schneider Canada should not be obligated to defend a case in this state where its contacts are "insignificant and insufficient to 'incur obligations to citizens entitled to the state's protection.'" *Parry*, 779 P.2d at 668 (citations omitted). Placing

this large burden on Schneider Canada, given the lack of its minimum contacts here in Utah and the fact the Gardners brought in defendants from whom they could properly seek damages, clearly violates the due process clause and the notions of fair play and substantial justice.

To conclude, the trial court correctly ruled the exercise of personal jurisdiction over Schneider Canada does not comport with due process under either the Gardners' "stream of commerce" or "corporate conglomerate" theories. Moreover, the balance of the convenience of the parties weighs against exercising personal jurisdiction over Schneider Canada. Accordingly, this Court should affirm the trial court's ruling granting Schneider Canada's Motion to Dismiss for lack of personal jurisdiction.

III. THE GARDNERS' CLAIMS AGAINST SCHNEIDER CANADA ARE MOOT IN ANY EVENT BECAUSE THE JURY VERDICT AND JUDGMENT BASED ON THE JURY VERDICT COLLATERALLY ESTOP THE GARDNERS FROM PROVING ANY OF THEIR CLAIMS AGAINST SCHNEIDER CANADA.

Even if this Court were to conclude the trial court's personal jurisdiction ruling was error, it should still affirm the dismissal of the claims against Schneider Canada because the record in the trial court demonstrates without question that those claims are moot. That is because the jury's findings in its special verdict exonerating SPX and HOJ collaterally estop the Gardners from proving their claims against Schneider Canada.[10] Thus, reversing and remanding the dismissal of those claims would be futile, and the Court should not do so. *See, e.g.*, *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶¶ 130-137,

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[10] This Court should affirm the jury verdict and the trial court's resulting judgment for reasons co-appellees, SPX and HOJ, will explain in their briefs.

82 P.3d 1076 (affirming dismissal of fraud claim on alternative ground that jury verdict in trial below had destroyed an essential factual predicate for fraud claim, thus rendering claim moot and precluding reversal or remand); *see also Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 16, 48 P.3d 968 ("[W]e will not adjudicate issues when the underlying [claim] is moot. A [claim] is deemed moot when the requested judicial relief cannot affect the rights of the litigants.") (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 25, 16 P.3d 1233).

Following the dismissal of Schneider Canada on jurisdictional grounds, there was a full-blown jury trial below, which resulted in a complete defense verdict in favor of SPX and HOJ. In its verdict, the jury specifically found the dock door leveler designed and sold by SPX did ***not*** contain a design defect that made the product unreasonably dangerous. This verdict necessarily encompasses Schneider Canada's control panel because the control panel was simply a component part of the end product—the dock door leveler. Therefore, even if the Court finds the trial court incorrectly ruled on the jurisdictional question as to Schneider Canada, the jury's verdict and the resulting judgment collaterally estop the Gardners from proceeding and recovering against Schneider Canada.

In Utah, collateral estoppel "is a judicially-created doctrine that 'prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.'" *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 29, 232 P.3d 1059 (internal citation omitted). To invoke collateral estoppel, a party must show the following elements:

> (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.

Id. Utah does not require mutuality of parties for collateral estoppel to apply. *Nielson v. Droubay*, 652 P.2d 1293, 1296 (Utah 1982) (stating the "rule is that a stranger to a judgment may assert a judgment against one who actually litigated an issue that was necessarily decided by the judgment and thereby preclude the relitigation of the same issue"); *see also Robertson v. Campbell*, 674 P.2d 1226, 1230 (Utah 1983) ("It is not necessary that the parties who assert collateral estoppel against one who lost the issue in a prior case were also parties to the first action."). Schneider Canada, therefore, is not precluded from invoking the collateral estoppel doctrine simply because it was dismissed early on in the underlying litigation and did not ultimately participate in the jury trial.

The jury verdict and judgment based on the jury verdict preclude the Gardners from relitigating their design defect claims against Schneider Canada. Here, the second through fourth elements that are necessary to invoke collateral estoppel cannot be disputed: as to the second element, the Gardners were parties to the proceedings below; as to the third element, the issue of whether the dock door leveler contained a design defect was fully and fairly litigated through the jury trial; and, as to the fourth element, the jury trial resulted in a jury verdict and final judgment based on the jury verdict. Thus, the only element from *Gudmundson* that requires further analysis is the first element—

whether the issue decided in the prior adjudication is identical to the one presented in the instant action.

Here, in the event the Court finds the district court incorrectly ruled upon the jurisdictional question, the remaining issues left to be litigated against Schneider Canada would be identical to the issue the Gardners already litigated and lost against SPX. One of the main issues the Gardners litigated through trial against SPX was whether the dock door leveler that allegedly caused Aaron Gardner's injury contained a design defect that made the product unreasonably dangerous. (R. 2269.) The jury found for SPX on this issue by concluding that the dock door leveler did not contain a design defect that made it unreasonably dangerous. (*Id.*) Because Schneider Canada's product, the control panel, was merely a component part of the dock door leveler, it is encompassed within the jury's verdict. In other words, the Gardners are collaterally estopped from relitigating whether Schneider Canada's control panel had a design defect because it is only a small piece of the overall product—the dock door leveler—that the jury already found to be not defective.

In sum, the jury's finding that the SPX dock door leveler did not contain a design defect collaterally estops the Gardners from asserting that the Schneider Control Panel—which was merely part of that dock door leveler—was defective. Thus, regardless of the correctness of the trial court's jurisdictional ruling, this Court should decline to remand the Gardners' claims against Schneider Canada for further proceedings because those claims are moot. This result accords with well-established appellate jurisprudence in Utah countenancing against the revival and remand of claims that can no longer impact

the rights of the litigants. *See, e.g., Jensen*, 2003 UT 51, ¶¶ 130-137 (affirming dismissal of fraud claim on alternative ground that jury verdict in trial below had destroyed an essential factual predicate for fraud claim, thus rendering claim moot and precluding reversal or remand); *Brookside Mobile Home Park*, 2002 UT 48, ¶ 16 ("[W]e will not adjudicate issues when the underlying [claim] is moot. A [claim] is deemed moot when the requested judicial relief cannot affect the rights of the litigants.") (quoting *Ellis v. Swensen*, 2000 UT 101, ¶ 25, 16 P.3d 1233).

CONCLUSION

This Court should affirm the dismissal of the Gardners' claims against Schneider Canada. The trial court correctly dismissed Schneider Canada from this action for lack of personal jurisdiction, and this Court should affirm that decision in all respects. Alternatively, the Gardners' claims against Schneider Canada are now moot because the jury verdict and resulting judgment exonerating SPX and HOJ collaterally estop the Gardners from asserting Schneider Canada's control panel was defective. Thus, reversing and remanding the claims against Schenider Canada for further proceedings would be futile, and the Court should not do so.

DATED this 27th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2010, I caused to be served via U.S. Mail, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE SCHNEIDER CANADA, INC.** to:

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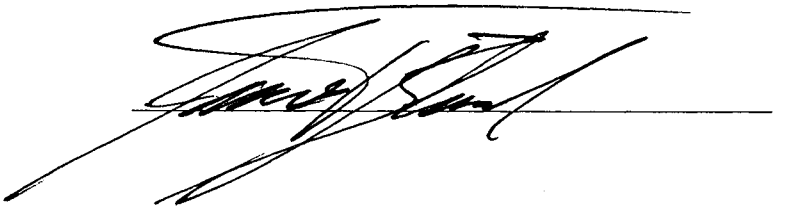

Tab A

(2) Under Subsection (1) neither the injured person nor the personal representatives or heirs of the person who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured person.

(3) This section may not be construed to be retroactive.

2009

78B-3-108. Shoplifting — Merchant's rights — Civil liability for shoplifting by adult or minor — Criminal conviction not a prerequisite for civil liability — Written notice required for penalty demand.

(1) As used in this section:

(a) "Merchandise" has the same meaning as provided in Section 76-6-601.

(b) "Merchant" has the same meaning as provided in Section 76-6-601.

(c) "Minor" has the same meaning as provided in Section 76-6-601.

(d) "Premises" has the same meaning as "retail mercantile establishment" found in Section 76-6-601.

(e) "Wrongful taking of merchandise" has the same meaning as "retail theft" as described in Section 76-6-602.

(2) A merchant may request an individual on his premises to place or keep in full view any merchandise the individual may have removed, or which the merchant has reason to believe the individual may have removed, from its place of display or elsewhere, whether for examination, purchase, or for any other reasonable purpose. The merchant may not be criminally or civilly liable for having made the request.

(3) A merchant who has reason to believe that merchandise has been wrongfully taken by an individual and that the merchant can recover the merchandise by taking the individual into custody and detaining the individual may, for the purpose of attempting to recover the merchandise or for the purpose of informing a peace officer of the circumstances of the detention, take the individual into custody and detain the individual in a reasonable manner and for a reasonable length of time. Neither the merchant nor the merchant's employee may be criminally or civilly liable for false arrest, false imprisonment, slander, or unlawful detention or for any other type of claim or action unless the custody and detention are unreasonable under all the circumstances.

(4) An adult who wrongfully takes merchandise is liable in a civil action, in addition to actual damages, for a penalty to the merchant in the amount of the retail price of the merchandise not to exceed $1,000, plus an additional penalty as determined by the court of not less than $100 nor more than $500, plus court costs and reasonable attorney fees.

(5) A minor who wrongfully takes merchandise and the minor's parents or legal guardian are jointly and severally liable in a civil action to the merchant for:

(a) actual damages;

(b) a penalty to the merchant in the amount of the retail price of the merchandise not to exceed $500 plus an additional penalty as determined by the court of not less than $50 nor more than $500; and

(c) court costs and reasonable attorney fees.

(6) A parent or guardian is not liable for damages under this section if the parent or guardian made a reasonable effort to restrain the wrongful taking and reported it to the merchant involved or to the law enforcement agency having primary jurisdiction once the parent or guardian knew of the minor's unlawful act. A report is not required under this section if the minor was arrested or apprehended by a peace officer or by anyone acting on behalf of the merchant involved.

(7) A conviction in a criminal action of shoplifting is not a condition precedent to a civil action authorized under Subsection (4) or (5).

(8) (a) A merchant demanding payment of a penalty under Subsection (4) or (5) shall give written notice to the person or persons from whom the penalty is sought. The notice shall state:

"IMPORTANT NOTICE: The payment of any penalty demanded of you does not prevent criminal prosecution under a related criminal provision."

(b) This notice shall be boldly and conspicuously displayed, in at least the same size type as is used in the demand, and shall be sent with the demand for payment of the penalty described in Subsection (4) or (5).

(9) The provision of Section 78B-8-201 requiring that compensatory or general damages be awarded in order to award punitive damages does not prohibit an award of a penalty under Subsection (4) or (5) whether or not restitution has been paid to the merchant either prior to or as part of a civil action.

2008

78B-3-109. Right to life — State policy — Act or omission preventing abortion not actionable — Failure or refusal to prevent birth not a defense.

(1) The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition, or dependency, including all persons with a disability and all unborn persons.

(2) A cause of action may not arise, and damages may not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

(3) The failure or refusal of any person to prevent the live birth of a person may not be a defense in any action, and may not be considered in awarding damages or child support, or imposing a penalty, in any action.

2008

78B-3-110. Defense to civil action for damages resulting from commission of crime.

(1) A person may not recover from the victim of a crime for personal injury or property damage if the person:

(a) entered the property of the victim with criminal intent and the injury or damage occurred while the person was on the victim's property; or

(b) committed a crime against the victim, during which the damage or injury occurred.

(2) The provisions of Subsection (1) do not apply if the person can prove by clear and convincing evidence that:

(a) his actions did not constitute a felony; and

(b) his culpability was less than the person from whom recovery is sought.

(3) Subsections (1) and (2) apply to any next-of-kin, heirs, or personal representatives of the person if the person is disabled or killed.

(4) Subsections (1), (2), and (3) do not apply if the person committing or attempting to commit the crime has clearly retreated from the criminal activity.

(5) "Clearly retreated" means that the person committing the criminal act has fully, clearly, and immediately ceased all hostile, threatening, violent, or criminal behavior or activity.

2008

PART 2

NONRESIDENT JURISDICTION ACT

78B-3-201. Title — Purpose.

(1) This part is known as the "Nonresident Jurisdiction Act."

(2) It is declared, as a matter of legislative policy, that the ıblic interest demands the state provide its citizens with an ffective means of redress against nonresident persons, who, ırough certain significant minimal contacts with this state, cur obligations to citizens entitled to the state's protection. ıis legislative action is necessary because of technological ·ogress which has substantially increased the flow of com- erce between the several states resulting in increased inter- tion between persons of this state and persons of other ates.

(3) The provisions of this part, to ensure maximum protec- ın to citizens of this state, should be applied so as to assert risdiction over nonresident defendants to the fullest extent rmitted by the due process clause of the Fourteenth Amend- ent to the United States Constitution. 2008

B-3-202. Definitions.

As used in this part:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state. 2008

B-3-203. Sworn certificate of nonresident doing business here.

1) Any nonresident person, other than insurance organi- ions, doing business in this state in one or more places shall a sworn certificate with the Division of Corporations and nmercial Code.

2) The certificate shall contain the name and address of manager, superintendent, or agent in this state upon om service of process may be had in any action arising out he conduct of the business. 2008

3-3-204. Effect of failure to file certificate — Service of process upon nonresident.

a nonresident person doing business as provided in tion 78B-3-203 fails to file a certificate, or the manager, erintendent, or agent designated in the certificate cannot ound within the state, service of process may be made by ing any person employed by or acting as an agent for the resident. 2008

3-3-205. Acts submitting person to jurisdiction.

otwithstanding Section 16-10a-1501, any person or per- al representative of the person, whether or not a citizen or dent of this state, who, in person or through an agent, does of the following enumerated acts is subject to the juris- ion of the courts of this state as to any claim arising out of elated to:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78B, Chapter 15, Utah Uniform Parentage Act, to determine paternity for the purpose of establishing responsibility for child support. 2008

78B-3-206. Service of process.

(1) Service of process on any party outside the state may be made pursuant to the applicable provisions of Rule 4 of the Utah Rules of Civil Procedure.

(2) Service of summons and of a copy of the complaint, if any, may also be made upon any person located without this state by any individual over 21 years of age, not a party to the action, with the same force and effect as though the summons had been personally served within this state. No order of court is required. An affidavit of the server shall be filed with the court stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether proper service has been made.

(3) Nothing contained in this section shall be construed to limit or affect the right to serve process in any other manner provided by law. 2008

78B-3-207. Only claims arising from enumerated acts may be asserted.

Only claims arising from acts enumerated in this part may be asserted against a defendant in an action in which jurisdiction over him is based upon this part. 2008

78B-3-208. Default judgments.

(1) A default judgment may not be entered until the expiration of at least 30 days after service.

(2) A default judgment entered on service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment entered on personal service within this state. 2008

78B-3-209. When exercisable.

Subject to the applicable statute of limitations, jurisdiction established under this part may be exercised regardless of when the claim arose. 2008

PART 3

PLACE OF TRIAL — VENUE

78B-3-301. Actions involving real property.

(1) Actions for the following causes involving real property shall be tried in the county in which the subject of the action, or some part, is situated:

(a) for the recovery of real property, or of an estate or interest in the property;

(b) for the determination, in any form, of the right or interest in the property;

(c) for injuries to real property;

(d) for the partition of real property; and

(e) for the foreclosure of all liens and mortgages on real property.

(2) If the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county selected is the proper county for the trial of the action. 2008

78B-3-302. Actions to recover fines or penalties — Against public officers.

(1) Actions to recover fines or penalties shall be tried in the county where the cause, or some part of the cause, arose.

(2) If a fine, penalty, or forfeiture imposed by statute is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on the lake, river, or stream opposite to the place where the offense was committed.

Tab B

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

History: Proposed by Congress on June 16, 1866; declared to have been ratified by three-fourths of all the states on July 28, 1868.

AMENDMENT XV

Section 1. [Right of citizens to vote — Race or color not to disqualify.]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. [Power to enforce amendment.]

The Congress shall have power to enforce this article by appropriate legislation.

History: Proposed by Congress on February 27, 1869; declared to have been ratified by more than three-fourths of all the states on March 30, 1870.

AMENDMENT XVI

[Income tax.]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Tab C

Original

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GINGER GARDNER, individually and as guardian of her minor child, SABRINA LYNN GARDNER; HEATHER ANN GARDNER; and JOSHUA LEE GARDNER,, Plaintiffs, vs. SPX CORPORATION; HOJ ENGINEERING & SALES CO., INC., d/b/a DOCK & DOOR SERVICES, a Utah corporation; SCHNEIDER ELECTRIC HOLDINGS, INC., a Delaware Corporation, SCHNEIDER CANADA, INC., a Canadian Corporation, and JOHN DOES 1-X,, Defendants.	**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT SCHNEIDER CANADA, INC.'S MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION** Case No. 040922873 Judge Timothy R. Hanson (Originally assigned to Judge Leslie A. Lewis)

This matter came before the Court on Defendant Schneider Canada, Inc.'s ("Schneider Canada") Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Lack of Personal Jurisdiction ("Schneider Canada's Motion to Dismiss"). Opposition briefs to Schneider Canada's Motion to Dismiss were filed separately by Plaintiffs and Defendant SPX Corporation

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("Defendant SPX"). Defendant HOJ Engineering & Sales Co., Inc. ("Defendant HOJ") filed no responsive brief. Oral argument on the Motion was heard on January 25, 2007. The Court, having fully considered Schneider Canada's Motion to Dismiss, Memorandum in Support, Plaintiff's Memorandum in Opposition, Defendant SPX's Memorandum in Opposition, Schneider Canada's Reply briefs, and all of the exhibits and affidavits attached to the respective briefs and having heard oral argument of all the parties, makes the following Findings of Fact and Conclusions of Law.

NATURE OF CASE AND PARTIES

1. In this action, Plaintiff alleges that on or about November 2, 2002, Plaintiff's decedent Aaron Gardner, in the course of his employment at the Sysco processing plant in West Jordan, Utah, was unloading his vehicle at loading dock door number 51 and that the leveler on dock door number 51 apparently came down on him without warning, fatally crushing him.

2. Plaintiff further alleges that the dock leveler installed at dock door number 51 was designed, manufactured, and sold by Defendant SPX and installed by Defendant HOJ.

3. As to Schneider Canada, Plaintiff asserts that Defendant SPX has identified Schneider Canada to be a party who is at fault for this accident; it has been alleged that Schneider Canada sold to Defendant SPX a defective part, which Defendant SPX installed on its product that was sold and distributed and installed as Dock Door Number 51 at the Sysco West Jordan Facility.

4. Plaintiffs allege the following causes of action against Defendant SPX and Schneider Canada: Negligence, Strict Liability, Failure to Warn, Breach of Express and Implied

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Warranties, and Punitive Damages. Plaintiffs allege Negligence, Failure to Warn and Breach of Implied Warranties and Punitive Damages against Defendant HOJ.

ARGUMENTS OF PARTIES

5. Schneider Canada brings its Motion to Dismiss on the grounds that Schneider Canada is a Canadian Corporation with no place of business and no other significant presence in the State of Utah. Schneider Canada does not do business in Utah.

6. Schneider Canada asserts that while it manufactured a component part of the subject dock leveler—specifically, the control box placed in the subject dock door leveler—the marketing, design, manufacture, construction, distribution and sale of the subject control box occurred entirely in Canada. Schneider Canada asserts that "all communications regarding the design, manufacture, construction, distribution and sale of the control box took place between and amongst individuals in Canada. The sale of the control box was to a Canadian distributor for distribution to the Canadian division of defendant SPX Corporation's predecessor-in-interest ("Serco)."

7. As such, it is asserted, Schneider Canada—either in its general business practices or in its involvement regarding the component part of the subject dock door leveler—did not purposefully avail itself of the privilege of doing business in the State of Utah. Accordingly, as Schneider Canada argues, jurisdiction is not proper.

8. Plaintiffs argue, among other things per their memorandum, that personal jurisdiction over Schneider Canada is proper because Schneider Canada purposefully designed, marketed and delivered the control box into the national stream of commerce through a

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distributor who markets and sells the component box throughout the United States and Utah. This, according to Plaintiffs, satisfies the due process requirements. Additionally, argue Plaintiffs, Schneider Canada is a billion dollar corporation with global reach, thus the burden placed on it to litigate this case in Utah is minimal when compared to the Plaintiffs' burden in litigating in Canada.

9. Defendant SPX Corporation similarly opposes Schneider Canada's Motion to Dismiss for the reasons set forth in its Memorandum in Opposition to Schneider Canada's Motion to Dismiss.

FINDINGS OF FACT

10. Schneider Canada is currently incorporated under the Federal Laws of Canada and its principle place of business is 19 Waterman Avenue, Toronto, Ontario, Canada. M4B 1Y2.

11. Schneider Canada's marketing, designing, manufacturing, construction, selling, and distributing of the subject control box at issue occurred entirely in Canada.

12. Schneider Canada designed the subject control box from specifications provided by the Canadian division of Defendant SPX's predecessor, Serco.

13. All communications regarding the marketing, design, manufacture, construction, and sale of the control box at issue took place between and amongst individuals in Canada, including but not limited to representatives of Schneider Canada, representatives of Serco's Canadian division, and representatives of Guillevin International, Inc. ("Guillevin International"), the Canadian distributor.

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14. Schneider Canada negotiated the sale of the subject control box in Canada to Serco's Canadian division.

15. Guillevin International sold the subject control box in Canada to Serco's Canadian division.

16. Some control boxes purchased from Schneider Canada were, in turn, sold by Serco's Canadian division to its affiliate in the United States.

17. At the time of the marketing, design and manufacture of the subject control box and its sale to the Canadian distributor Guillevin International, Schneider Canada was aware that some control boxes would be installed in dock levelers for the United States market, but was not specifically made aware that the control box in question would be used in the State of Utah.

18. Schneider Canada does not do business in the State of Utah; is not registered to conduct business in the State of Utah. Schneider Canada owns no property in the State of Utah, pays no taxes, has no employees, officers, or offices in the State of Utah, and has not had any continuous or systematic dealings with the State of Utah. None of Schneider Canada's shareholders reside in the State of Utah. Schneider Canada does not maintain telephone or facsimile listings within the State of Utah nor does it advertise in the State of Utah. Schneider Canada has not conducted any business, communicated, or caused communications to occur with any consumer in the State of Utah, nor do a substantial percentage of its sales derive from revenue generated from customers in the State of Utah. Schneider Canada does not render services to any customers in the State of Utah.

19. Schneider Canada is a subsidiary of Square D Company, a Delaware Corporation with its principal place of business in Palatine, Illinois. Square D Company is a legal entity separate and distinct from Schneider Canada. Square D Company did not market, design, manufacture, construct, sell or distribute the subject electrical component or any component of the dock leveler at issue in this litigation.

CONCLUSIONS OF LAW

20. Having reviewed the Pleadings, Defendant Schneider Canada's Motion to Dismiss the Fourth Amended Complaint, its Memorandum and Replies in Support, Plaintiffs' Memorandum in Opposition, and Defendant SPX's Memorandum in Opposition, and all affidavits and exhibits thereto, and having heard oral argument of the parties, the Court finds that additional discovery is not required for the determination and resolution of the issue of whether this Court has personal jurisdiction over Schneider Canada.

21. Schneider Canada is not conducting substantial and continuous local activity in the State of Utah sufficient to meet the requirements for this Court to confer general jurisdiction over Schneider Canada.

22. With regard to specific jurisdiction, while the facts in this case indicate that Schneider Canada's actions may fulfill one or some of the enumerated requirements set forth in Utah Code Ann. § 78-27-24 (West 2004)("the Utah Long-Arm Statute"), the assertion of jurisdiction over Schneider Canada does not comport with the due process requirements of the Fourteenth Amendment. Schneider Canada does not have minimum contacts with Utah such that

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the maintenance of the suit against it does not offend traditional notions of fair play and substantial justice.

23. Schneider Canada's actions of manufacturing the control box in Canada in accordance to the specifications of the Canadian Division of Serco, and selling it to a Canadian distributor for ultimate placement in Serco's dock levelers is not activity sufficient to show that Schneider Canada purposefully availed itself of conducting business in the State of Utah.

24. Mere awareness on the part of Schneider Canada that some of the control boxes it manufactured would be placed in dock levelers to be sold and used in the United States market is not sufficient to confer jurisdiction over Schneider Canada in the State of Utah.

25. The actions of Schneider Canada of placing the control box into the stream of commerce are not sufficient to confer jurisdiction over Schneider Canada

26. Schneider Canada's relationship with Square D Company, does not establish jurisdiction over Schneider Canada.

27. In light of the above findings, Defendant Schneider Canada is not subject to the jurisdiction of the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED:

i. Defendant Schneider Canada, Inc.'s Motion to Dismiss Plaintiffs' Fourth Amended Complaint Based on Lack of Personal Jurisdiction is GRANTED;

ii. This case is DISMISSED for lack of personal jurisdiction solely as to Schneider Canada, Inc.

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iii. All parties shall bear their respective costs and fees relating to this Motion to Dismiss.

DATED this 11 day of, April 2007

BY THE COURT:

By: _____
Timothy R. Hanson
Third District Court Judge

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE

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Approved as to form:

KATHERINE VENTI
PARSONS BEHLE & LATIMER
Attorneys for Defendants Schneider Electric Holdings, Inc. and Schneider Canada, Inc.

1261

Approved as to form:

ROBERT GILCHRIST
EISENBERG GILCHRIST & MORTON
Attorneys for Plaintiffs

1262

Approved as to form:

KENNETH W. YEATES
BERMAN & SAVAGE, P.C.
Attorneys for Defendant SPX Corporation

1263

Approved as to form:

JOSEPH JOYCE
J. JOYCE & ASSOCIATES LAW FIRM, P.C.
Attorneys for Defendant HOJ Engineering & Sales Co.

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Tab D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GINGER GARDNER, individually and as guardian of her minor children SABRINA LYNN GARDNER; HEATHER ANN GARDNER; and JOSHUA LEE GARDNER,	:	**SPECIAL VERDICT FORM**
	:	**CASE NO. 040922873**
Plaintiffs,	:	
vs.	:	
SPX CORPORATION; HOJ ENGINEERING &SALES CO., INC., dba DOCK & DOOR SERVICES, a Utah corporation; SCHNEIDER ELECTRIC HOLDING, INC., a Delaware Corporation; and JOHN DOES I-X,	:	
Defendants.	:	

MEMBERS OF THE JURY:

Attached is the Special Verdict Form which applies to the above case.

Dated: June 16, 2009

By the Court

Robert P. Faust
District Court Judge

SALT LAKE CITY · SALT LAKE COUNTY · STATE OF UTAH · DISTRICT COURT

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SPECIAL VERDICT FORM

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented.* If you find that the evidence favors the issues by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of the evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

1. Was Defendant SPX Corporation negligent in the design of its product?

   ANSWER: YES _____ NO ✓

   If you answered "Yes" please answer Question No. 2.

   If you answered "No" to Question No. 1, skip Question No. 2 and please proceed to Question No. 3.

2. Was the negligence of Defendant SPX Corporation a proximate cause of Aaron Gardner's death on November 2, 2002?

   ANSWER: YES _____ NO _____

   Please proceed to Question No. 3.

3. Did Defendant SPX Corporation manufacture and sell a product that contained a design defect that made the product unreasonably dangerous?

   ANSWER: YES _____ NO ✓

   If you answered "Yes" please answer Question No. 4.

   If you answered "No" to Question No. 3, skip Question No. 4 and please proceed to Question No. 5.

4. Was Defendant SPX's unreasonably dangerous product containing the design defect, a proximate cause of Aaron Gardner's death on November 2, 2002?

   ANSWER: YES _____ NO _____

Please proceed to Question No. 5.

5. Was Defendant HOJ Engineering & Sales Co., Inc., d/b/a Dock & Door Services negligent as alleged by the Plaintiffs?

ANSWER: YES _____ NO ✓

If you answered "Yes" please answer Question No. 6.

If you answered "No" to Question No. 5, skip Question No. 6, but read the instructions following Question No. 6.

6. Was the negligence of Defendant HOJ Engineering & Sales Co., Inc., d/b/a Dock & Door Services a proximate cause of Aaron Gardner's death on November 2, 2002?

ANSWER: YES _____ NO _____

If you answered "Yes" to Question No. 1 **and** No. 2 **and/or** answered "Yes" to Question No. 3 **and** No. 4 **and/or** if you answered "Yes" to Question No. 5 **and** No. 6, then proceed to Question No. 7. If you did not answer "Yes" to those Questions, then stop your deliberations and please have the foreperson sign this verdict.

If you answered "Yes" to either Question 2, 4 or 6, please proceed to Question No. 7.

7. Was Sysco Intermountain Food Services, Inc. negligent as alleged by the Defendants?

ANSWER: YES _____ NO _____

If you answered "Yes" please answer Question No. 8.

If you answered "No" skip Question no. 8 and please proceed to Question No. 9.

8. Was the negligence of Sysco Intermountain Food, Inc. a proximate cause of Aaron Gardner's death on November 2, 2002?

ANSWER: YES _____ NO _____

Please proceed to Question No. 9.

9. Was Aaron Gardner negligent as alleged by the Defendants?

ANSWER: YES _____ NO _____

If you answered "Yes" please answer Question No. 10.

If you answered "No" skip Question No.10 and proceed to Question No. 11.

10. Was the negligence of Aaron Gardner a proximate cause of his death on November 2, 2002?

ANSWER: YES _____ NO _____

Please proceed to Question No. 11

11. For each of the following parties you found to be negligent or made a unreasonably dangerous product and was a proximate cause of Aaron Gardner's death on November 2, 2002, please state what percentage of fault that is attributable to that party. In other words, if you answered either Question No. 1 or No. 2 "No," and answered either Question No. 3 or No. 4 "No", then do not assign any percentage of fault to SPX Corporation. If you answered Question No. 5 or No. 6 "No", do not assign any percentage of fault to defendant HOJ.

The total of those to who fault is assigned must equal 100%.

A.	SPX Corporation	_____%
B.	HOJ Engineering & Sales Co., Inc.,	_____%
C.	Sysco Intermountain Food, Inc.	_____%
D.	Aaron Gardner	_____%
	TOTAL:	100%

If you did not assign a percentage of fault to either SPX Corporation or HOJ, then stop your deliberations and please have the foreperson sign this verdict.

If you did assign a percentage of fault to either SPX or HOJ, please proceed to Question No. 12.

12. What amount do you find that would fairly compensate Plaintiffs for the harm suffered by the death of Aaron Gardner. When making this decision, do *not* make a deduction from damages for any percentage of fault that you have assessed to Aaron Gardner and/or Sysco Intermountain Foods. The judge will make any necessary deductions later.

ECONOMIC

a.	Past Lost Wages	_____
b.	Future Lost Wages	_____
c.	Past Fringe Benefits	_____
d.	Future Fringe Benefits	_____
e.	Past Lost Household Services	_____
f.	Future Lost Household Services	_____
	TOTAL:	_____

NON-ECONOMIC

A.	Ginger Gardner	_____
B.	Sabrina Gardner	_____
C.	Heather Gardner	_____
D.	Joshua Gardner	_____
	TOTAL:	_____

DATED this 16 day of June, 2009.

F. Mei

FOREPERSON